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IN THE

Supreme Court of The United States

OCTOBER TERM, 1977

No. 77-313

RICHARD L. MASON, individually, and A. MARCO TURK, Trustee of the Testamentary Trust Under the Will of Harry Turk, deceased,

Petitioners,

vs.

UNITED STATES OF AMERICA; FEDERAL COMMUNICATIONS COMMISSION; GTE SATELLITE CORPORATION, etc.; GENERAL TELEPHONE AND ELECTRONICS CORPORATION; and AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Respondents.

BRIEF OF RESPONDENTS GSAT, GT&E AND AT&T IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TOPICAL INDEX

	Page
Statement of the Case	1
Reasons for Denying Writ	4
I. The Court of Appeals Correctly Decided This Case	5
A. Jurisdiction to Review FCC Construction Permit Orders is Vested Exclusively in the Court of Appeals for the District of Columbia	5
B. NEPA Does Not Provide an Independent Jurisdictional Basis for Judicial Review of the FCC's Order	7
C. Review of the FCC's Construction Permit Order Is Not Governed by Any Provision in Chapter 6 of Title 47	10
II. There Is No Conflict Between the Decision of the Ninth Circuit and Those of This Court or of Other Circuits	12
Conclusion	17

TABLE OF AUTHORITIES

Cases

Page

Anaconda Co. v. Ruckelshaus, 482 F.2d 1301, 1304-5 (10th Cir. 1973) 13

B. F. Goodrich Co. v. Northwest Industries, Inc., 424 F.2d 1349, 1352-54 (3d Cir.), *cert. denied*, 400 U.S. 822 (1970) 10, 13

Boire v. Greyhound Corp., 376 U.S. 473, 481 (1964) 16

Citizens Committee v. FCC, 506 F.2d 246, 269 (D.C. Cir. 1974) 6

Citizens for Clean Air, Inc. v. Corps of Engineers, 349 F.Supp. 696 (S.D.N.Y. 1972) 14

City of Highland Park v. Train, 519 F.2d 681, 688-89 (7th Cir. 1975), *cert. denied*, 47 L.Ed.2d 337 (1976) 13

City of Romulus v. County of Wayne, 392 F.Supp. 578 (E.D. Mich. 1975) 14

Coca-Cola Co. v. FTC, 475 F.2d 299, 302 (5th Cir.) *cert. denied*, 414 U.S. 877 (1973) 13

Environmental Defense Fund v. Hardin, 325 F.Supp. 1401 (D.D.C. 1971) 14

Frito-Lay, Inc. v. FTC, 380 F.2d 8, 10 (5th Cir. 1967) 7, 14

Gage v. Commonwealth Edison Co., 356 F.Supp. 80 (N.D. Ill. 1972) 14

Gardner v. Alabama, 385 F.2d 804, 810 (5th Cir. 1967); *cert. denied*, 289 U.S. 1046 (1968) 14

Getty Oil Co. v. Ruckelshaus, 467 F.2d 349, 359 (3rd Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973) .. 7, 8, 9, 13

Izaak Walton League v. Schlesinger, 337 F.Supp. 287 (D.D.C. 1971) 14, 15

Page

Kesinger v. Universal Airlines, Inc., 474 F.2d 1127, 1131-32 (6th Cir. 1973) 13

Leedom v. Kyne, 358 U.S. 184 (1958) 15, 16

Nader v. Volpe, 466 F.2d 261, 265-68 (D.C. Cir. 1972) 13

Network Project v. FCC, 511 F.2d 786, 789, 797 (D.C. Cir. 1975) 2, 6, 11

North Carolina v. FPC, 393 F.Supp. 1116 (M.D.N.C. 1975) 9

Oling v. Air Line Pilots Ass'n, 346, F.2d 270, 276 (7th Cir.), *cert. denied*, 382 U.S. 926 (1965) 14

Oljato Chapter of Navajo Tribe v. Train, 515 F.2d 654, 659-61 (D.C. Cir. 1975) 13

Robinson v. Dow, 522 F.2d 855, 858 (6th Cir. 1975) 13

Save Our Sound Fisheries Ass'n v. Calloway, 387 F.Supp. 292 (D.R.I. 1974) 14

Sterling Drug, Inc. v. Weinberger, 509 F.2d 1236, 1239 (2d Cir. 1975) 16

Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 336 (1958) 5

Taylor v. Cohen, 405 F.2d 277, 279-80 (4th Cir. 1968) 13, 14

UMC Indus v. Seaborg, 439 F.2d 953, 955 (9th Cir. 1971 13

United States v. SCRAP, 412 U.S. 669 (1973) 8

United States v. Southern Railway Co., 380 F.2d 49, 53-55 (4th Cir. 1967) 14

United States v. Southern Railway Co., 364 F.2d 86, 91-93 (5th Cir. 1966); *cert. denied*, 386 U.S. 1031 (1967) 14

Utah Int'l, Inc. v. EPA, 478 F.2d 126, 128 (10th Cir. 1973) 13

Valley Vision, Inc. v. FCC, 399 F.2d 511, 514 (9th Cir. 1968) 6, 7

Whitney Bank v. New Orleans Bank, 379 U.S. 411, 419, 422 (1965) 6, 12, 13

Page

Statutes and Regulations

47 C.F.R. § 1.106 2

28 U.S.C. § 2342 15

42 U.S.C.
§ 1857h-5(b) 7

§ 4332 (2)(C) 8

47 U.S.C.
§ 402(b) 1, 3, 4

§ 402(c) 2, 3

48 U.S.C. § 15(7) 8

Administrative Proceedings

Application of GTE Satellite Corp., 59 F.C.C. 2d 923, 924 (1976) 2, 4

Application of Hughes Aircraft Co. and *GTE Satellite Corp.*, (Docket No. 19812), 43 F.C.C. 2d 1141 (1973) 2

Establishment of Domestic Communications — Satellite Facilities by Non-Governmental Entities, 22 F.C.C. 2d 128-133 (1970) 11, 12

Establishment of Domestic Communications — Satellite Facilities by Non-Governmental Entities, 35 F.C.C. 2d 844, 860 (1972) 11

Establishment of Domestic Communications — Satellite Facilities by Non-Governmental Entities, 38 F.C.C. 2d 665, 705 (1972) 11

Applications of GTE Satellite Corp., 49 F.C.C. 2d 42, 54 (1974) 11

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BRIEF OF RESPONDENTS GSAT, GT&E AND AT&T IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

The only question presented is the following:

Does a district court have jurisdiction to hear a collateral challenge to a Federal Communications Commission order which is appealable under 47 U.S.C. § 402(b) to the United States Court of Appeals for the District of Columbia?

STATEMENT OF THE CASE

Petitioners own 280 acres of undeveloped land in the Triunfo Pass area of the Santa Monica Mountains in

Los Angeles County, California. On December 22, 1970, the predecessor of Respondent GTE Satellite Corporation ("GSAT") filed an application with the Federal Communications Commission ("FCC") for approval of a domestic satellite communications system, including an earth satellite station to be constructed in the Triunfo Pass area. On January 11, 1971 petitioner Mason wrote GSAT's parent corporation, General Telephone & Electronics Corporation ("GT&E"), asserting that Triunfo Pass was "most desirable for a Satellite Ground Station" and offering to sell his land for the proposed earth station. On January 18, 1971, Mason also placed an advertisement for the sale of his Triunfo Pass land, describing it as "the best of possible Los Angeles sites" for an earth station.[1]

On September 12, 1973, after public notice and hearing, the FCC issued a Memorandum Opinion and Order granting GSAT permission to construct the proposed system, including an earth station at Triunfo Pass.[2] Petitioners knew of the FCC order. They did not appear in the proceedings to seek a rehearing as permitted under the FCC's rules (47 C.F.R. § 1.106). The FCC's order was appealed by certain interested parties (*Network Project v. FCC*, 511 F.2d 786, 797 (D.C. Cir. 1975)), but petitioners did not participate in the appellate proceedings or otherwise seek judicial review within the 30-day period prescribed by 47 U.S.C. § 402(c). Instead, they urged GSAT to purchase or lease their land for the earth station site. By certified letter dated July 16, 1974, petitioner Turk, an attorney, notified GSAT that if it did not purchase petitioners' land they would undertake legal efforts "to keep GTE out of our area." GSAT

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[1] *Application of GTE Satellite Corp.*, 59 F.C.C. 2d 923, 924 (1976).

[2] *Application of Hughes Aircraft Co. and GTE Satellite Corp.*, (Docket No. 19812), 43 F.C.C. 2d 1141 (1973).

declined to respond to this threat and ultimately purchased a 40-acre tract adjacent to that offered by petitioners. Thereafter, petitioners made good on their threat by filing suits in state court[3] and federal district court seeking to enjoin construction of the Triunfo Pass station.

Petitioners' complaint was filed in the District Court on June 30, 1975, some 20 months after expiration of the 30-day period prescribed by 47 U.S.C. § 402(c) for seeking judicial review of FCC orders granting construction permits. The complaint alleged that the FCC's September 12, 1973 order failed to comply with requirements of the National Environmental Policy Act ("NEPA"), and sought a judicial declaration invalidating the FCC order on that ground. Respondents moved to dismiss the complaint on the grounds that jurisdiction to review FCC orders granting construction permits is vested exclusively in the Court of Appeals for the District of Columbia pursuant to 47 U.S.C. § 402(b). The District Court granted the motion to dismiss for lack of subject matter jurisdiction, and on November 21, 1975 judgment was entered for respondents. Petitioners appealed, and on May 27, 1977 the Court of Appeals affirmed the decision of the District Court, holding that 47 U.S.C. § 402 "clearly ousts district courts of jurisdiction over chal-

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[3] In the state court action, petitioners sought a writ of mandate to enjoin construction of the Triunfo Pass station on the grounds of alleged failure to comply with the environmental impact report requirements of the California Environmental Quality Act ("CEQA"). *Richard L. Mason, et al. v. County of Los Angeles, et al.*, Los Angeles Superior Court No. C-122693, filed May 5, 1975. Following trial, the state court entered judgment for GSAT and the other defendants on December 22, 1975, specifically finding: (1) that there had been full compliance "with each and every applicable federal, state and local law and ordinance . . . including each and every applicable requirement of CEQA and any guidelines promulgated thereunder;" and (2) that plaintiffs had instituted the state action "as a bargaining lever and not for any legitimate purpose."

lenges to FCC orders." (App. A to Petition). This Petition followed.[4]

REASONS FOR DENYING WRIT

Petitioners have devoted considerable attention in their brief to the requirements of NEPA and the power of district courts generally to enforce NEPA. It is doubtless their intent in so doing to suggest the existence of the substantial, unresolved federal issue which this Court's Rule 19 suggests is necessary to justify the exercise of jurisdiction on writ of certiorari. Petitioners' arguments with respect to the scope of NEPA and its enforcement are immaterial to the resolution of this case, however. The sole issue raised herein is whether the provision in 47 U.S.C. § 402(b) for direct appeal from an FCC order granting a construction permit precludes a collateral challenge to such order in district court proceedings. With respect to this issue, no claim has been made, or can be made, that the requirements of Rule 19 have been satisfied. The decision of the Court of Appeals on this point was demonstrably correct and entirely in accord with the decisions of this Court and of the other courts of appeal which have considered this jurisdictional issue.

[4] Shortly after the District Court's judgment, petitioners appeared in proceedings that were pending before the FCC on requests by GSAT for modification of its construction permit. In those proceedings (F.C.C. Docket 20201), petitioners belatedly contended that the September 12, 1973 issuance of GSAT's construction permit was invalid because of alleged noncompliance with NEPA. On June 9, 1976, the FCC issued a Memorandum Opinion and Order, holding that petitioners' challenge to the September 12, 1973 Order was untimely and in any event that the 1973 Order complied with NEPA since the Commission originally had "considered environmental factors and found GSAT had made a sufficient showing that the proposed station would not damage the quality of the environment." *Application of GTE Satellite Corp.*, 59 F.C.C. 2d 923, 924 (1976). Petitioners could have appealed this order pursuant to 47 U.S.C. § 402(b), but did not do so.

I. THE COURT OF APPEALS CORRECTLY DECIDED THIS CASE

A. Jurisdiction to Review FCC Construction Permit Orders is Vested Exclusively in the Court of Appeals for the District of Columbia

It is beyond dispute "that Congress . . . may prescribe the procedure and conditions under which, and the courts in which, judicial review of administrative orders may be had." *Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958). In § 402(b) of the Communications Act, Congress did so prescribe a specific, complete and exclusive mode for judicial review of FCC orders granting construction permits. Section 402(b)(1) provides that "Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia . . . [b]y any applicant for a construction permit," and § 402(b)(6) provides that such appeal may be taken "[b]y any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying . . . [such] application. . . ."[5] The appeal must be taken "within thirty days from the date upon which public notice is given of the decision or order complained of" (§ 402(c)); the appeal must be heard by the Court of Appeals "[a]t the earliest convenient time" (§ 402(g)); and the Court of Appeals' decision is subject to review only by the Supreme Court. (§ 402(j)).

This Court has emphasized that when Congress has enacted such "a specific statutory scheme for obtaining review . . . the statutory mode of review [must] be adhered to notwithstanding the absence of an express statu-

[5] Judicial review of all other FCC orders, not enumerated in § 402(b), is also narrowly confined. Such orders may be reviewed only by a Court of Appeals (47 U.S.C. § 402(a); 28 U.S.C. § 2343), and petitions for such review must be filed within 60 days (28 U.S.C. § 2344).

tory command of exclusiveness." *Whitney Bank v. New Orleans Bank*, 379 U.S. 411, 422 (1965). Accordingly, the courts have uniformly held that § 402(b)'s provision for appellate review of FCC orders is "exclusive," *Citizens Committee v. FCC*, 506 F.2d 246, 269 (D.C. Cir. 1974), and that "all attacks on . . . orders of the Commission, on whatever ground, must be by appeal to the District of Columbia Circuit under § 402(b). . . ." *Valley Vision, Inc. v. FCC*, 399 F.2d 511, 514 (9th Cir. 1968).

The reasons for requiring exclusive adherence to § 402's specific statutory review scheme are obvious. By providing for centralized and expedited review in one court of appeals, Congress clearly sought to guarantee uniformity of decision and to preclude the delay, uncertainty, and frustration of FCC action that might occur if judicial review could be had in any of the district courts. The quick finality of decision intended by Congress could never be achieved if parties aggrieved by FCC construction permit orders could collaterally attack such orders years after expiration of § 402(c)'s 30-day time limit for direct judicial review. Moreover, tolerance of district court suits would encourage multiplicity of litigation and forum shopping, which would plainly undermine the uniformity of decision Congress sought to achieve by confining judicial review to one court.

These are not hypothetical considerations. The FCC's order of September 12, 1973 was appealed by several interested parties. *Network Project v. FCC*, 511 F.2d 786, 797 (D.C. Cir. 1975). Untimely judicial review of the same FCC order by whatever district court might be chosen by a plaintiff would necessarily entail what Congress sought to avoid — duplicative judicial proceedings, delay and potential conflict with decisions rendered by the Court of Appeals for the District of Columbia.

B. NEPA Does Not Provide an Independent Jurisdictional Basis for Judicial Review of the FCC's Order

Petitioners assert that § 402(b) should be deemed inapplicable because their claim is based on NEPA. This argument assumes that the applicability of an exclusive review scheme depends upon the substantive basis of a litigant's challenge to an administrative order. Such is clearly not the case. When there is a statutory provision prescribing a specific route for judicial review, all arguments, "constitutional, jurisdictional, substantive, and procedural," must be raised solely in the statutory review proceeding. *Frito-Lay, Inc. v. FTC*, 380 F.2d 8, 10 (5th Cir. 1967). "[A]ll attacks on . . . orders of the [Federal Communications] Commission, on whatever ground, must be by appeal to the District of Columbia Circuit under § 402(b). . . ." *Valley Vision, Inc. v. FCC*, *supra*, 399 F.2d at 514. Section 402(b)'s restriction of judicial review applies to all challenges to construction permit orders, whether based on NEPA or some other statutory or constitutional ground.

Getty Oil Co. v. Ruckelshaus, 467 F.2d 349 (3d Cir. 1972), *cert denied*, 409 U.S. 1125 (1973), is a case directly in point. *Getty* was a lawsuit filed in the district court, challenging action taken by the EPA Administrator under the Clean Air Act. Section 307(b)(1) of that Act, like § 402(b) of the Communications Act, restricts judicial review of actions by the Administrator to an appeal to the Court of Appeals for the District of Columbia, which must be filed within 30 days of public notice of the Administrator's action. 42 U.S.C. § 1857h-5(b). Plaintiff did not comply with the statutorily prescribed procedure, but rather, like petitioners here, filed an action in district court. Plaintiff urged that its claim was based on NEPA and therefore not subject to the exclusive review provisions of the Clean Air Act. The Third Circuit summarily rejected this argument, stating:

"Appellant's . . . argument is that EPA's failure to file an environmental impact statement pursuant to section 102(2)(c) of the National Environmental Policy Act, 42 U.S.C. § 4332(2)(C), renders the Administrator's compliance order ultra vires. Even if we were to agree with Getty's premise that EPA is subject to the NEPA requirement, such an issue is properly raised in a section 307 proceeding. . . . Failure to utilize the section 307 proceeding forecloses review. . . ." (467 F.2d at 359.)

This Court has also made clear, under analogous circumstances, that NEPA does not provide a jurisdictional base for review of an administrative order when such review is otherwise precluded or restricted by specific statutory provision. *United States v. SCRAP*, 412 U.S. 669 (1973). *SCRAP* was an action to enjoin enforcement of an ICC rate order because of an alleged failure to prepare an environmental impact statement in violation of NEPA. This Court had previously ruled that 48 U.S.C. § 15(7) precluded federal court jurisdiction to enjoin such ICC orders. Plaintiff contended, however, as do petitioners in this case, that "NEPA implicitly conferred authority 'on the federal courts to enjoin *any* federal action taken in violation of NEPA's procedural requirements.'" (412 U.S. at 690.) This Court disagreed, reasoning that "NEPA was not intended to repeal by implication any other statute" (412 U.S. at 694), and that "nothing either in the language or history of NEPA . . . suggests a restoration of previously eliminated judicial power. . . ." (412 U.S. at 695.)

Petitioners assert that § 402(b) applies only to "judicial review of the *merits* of FCC orders," and that their NEPA attack "does not go to the merits of the FCC's action, but rather to the FCC's ability to act at all." (Petition, p.25). The same type of argument was rejected in *Getty*, where plaintiffs sought to avoid the exclusive review provision of the Clean Air Act by asserting that NEPA rendered the challenged administrative order "ultra vires." *Getty v. Ruckelshaus, supra*, 467 F.2d at 359. Similarly, in *North Carolina v. FPC*, 393 F.Supp. 1116 (M.D.N.C. 1975), the court rejected the notion that an exclusive review scheme can be avoided by characterizing the nature of the judicial review sought. In that case, plaintiffs sued in district court, challenging an order of the Federal Power Commission on the ground that it violated provisions of the Wild and Scenic Rivers Act. In an attempt to avoid the exclusive review provisions of § 313(b) of the Federal Power Act, they asserted, like petitioners here, that they were not seeking review of the FPC's license order under the Federal Power Act, but rather, seeking to enforce a duty under the Wild and Scenic Rivers Act. In rejecting this argument the court stated:

"In their oral argument and throughout their briefs, plaintiffs repeatedly make the point that they are not seeking review of the F.P.C. license in this Court, rather they are seeking review of F.P.C. action under the Wild and Scenic Rivers Act. In the final analysis, it is this distinction which breaks down under scrutiny. . . . [I]f plaintiffs are correct, could not each and every affected landowner bring a separate suit for the enforcement of rights under the Wild and Scenic Rivers Act or the National Environmental Policy Act in both this Court or the District Court for the Western District of Virginia? What then would become of section 313(b) of the Federal Power Act? What then would we do with those 'simple words of plain meaning (which) leave no room to doubt the congressional purpose and intent'?" (393 F.Supp. at 1128.)

Thus, however petitioners might wish to characterize their suit they run afoul of § 402(b). A "statutory procedure for review is applicable" even though the "order

is not directly attacked — so long as the practical effect of a successful suit would contradict or countermand a Commission order." *B. F. Goodrich Co. v. Northwest Industries, Inc.*, 424 F.2d 1349, 1352-54 (3d Cir.), *cert denied*, 400 U.S. 822 (1970). Here the agency order is directly attacked, and there is no doubt but that petitioners seek to "countermand" the order — they avowedly seek a judicial declaration of its invalidity. The fact that they premise their challenge on NEPA rather than the Communications Act is irrelevant.

C. Review of the FCC's Construction Permit Order Is Not Governed by Any Provision in Chapter 6 of Title 47

Chapter 5 of Title 47 (§§ 151-609) is the Communications Act of 1934, the basic law governing the FCC's power and authority. Chapter 6 of Title 47 (§§ 701-744) is the Communications Satellite Act of 1962. The Petition (pp.31-38) asserts that the FCC's September 12, 1973 Order was issued pursuant to the 1962 Act and that § 402(b) is inapplicable to judicial review of orders issued under the 1962 Act. The Court of Appeals correctly rejected this argument. The FCC's September 12, 1973 Order was not issued under authority of the 1962 Act, but even if it had been, § 402(b) would nonetheless apply.

The express purpose of the 1962 Act was to authorize United States participation in a "*global* communications network"[6] (§ 701) and the formation of a "communication satellite corporation" ("COMSAT") (§§ 731-35). In § 701(d) Congress expressly disclaimed any intention to have the 1962 Act "preclude the creation of additional communications satellite systems," i.e., *domestic* communications satellite systems. The system authorized by

[6] Emphasis here, and following, is supplied unless otherwise noted.

the FCC's September 12, 1973 order is a "*domestic* satellite system," (43 F.C.C. 2d 1141), and all administrative and judicial proceedings held in connection therewith have been conducted pursuant to, and under the authority of, the provisions of the 1934 Act,[7] including the § 402(b) appeal to the Court of Appeals for the District of Columbia. *Network Project v. FCC, supra* at 789.

In its First Report and Order in the *Domestic Communications-Satellite* proceedings the FCC rejected contentions that the 1962 Act governs *domestic* satellite systems authorizations, and expressly found that the Commission's authority to grant permits for *domestic* satellite systems is based on the 1934 Communications Act, i.e., Chapter 5 of Title 47. The Commission stated:

> ". . . The Commission's clear jurisdiction over commercial domestic satellite facilities under the 1934 act was not withdrawn by the 1962 act, which legislated in the field of international satellite communications. The declared purpose of the 1962 act was to establish a global satellite communications system in conjunction and in cooperation with other countries (sec. 102(a)) and to provide for United States participation in the global system * * * in the form of a private corporation, subject to appropriate regulations (sec. 102(c)). H.R. Rept. No. 1636, 87th Cong., second sess., p.7. . . .
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> ". . . [I]t would be unreasonable to assume that Congress, in enacting provisions tailored to an international system established in conjunction and in cooperation with other countries, would have sup-

[7] *See, Establishment of Domestic Communication – Satellite Facilities by Nongovernmental Entities*, 22 F.C.C. 2d 128-133 (1970); *Establishment of Domestic Communications – Satellite Facilities by Non-Governmental Entities*, 35 F.C.C. 2d 844, 860 (1972); *Establishment of Domestic Communications – Satellite Facilities by Non-Governmental Entities*, 38 F.C.C. 2d 665, 703 (1972); *Applications of GTE Satellite Corp.*, 49 F.C.C. 2d 42, 54 (1974).

planted the 1934 Act in the domestic field — traditionally only of sovereign concern — without mentioning that it was doing so. The 1962 Act does not contain any express requirement that domestic satellite service shall be provided in accordance with the provisions governing the global system or any statement withdrawing the Commission's powers under the 1934 act to authorize an additional non-Government domestic system." *Establishment of Domestic Communication-Satellite Facilities by Nongovernmental Entities*, 22 F.C.C. 2d 86, 130-131 (1970).

Even if the 1962 Act were assumed somehow to pertain to issuance of a construction permit for *domestic* satellite facilities (which is clearly not the case), it still would not follow that the September 12, 1973 order was outside the scope of § 402(b). The 1962 Act is expressly designated as an amendment and supplement to the 1934 Act (§ 721(c)), and since it contains no procedural provisions, it necessarily must be implemented by the Inquiry, Rule-Making and Hearing procedures authorized under the 1934 Act. Indeed, § 721(c) of the 1962 Act expressly states that authorization of construction of satellite stations for international networks is to be undertaken by "the Federal Communications Commission, *in its administration of the provisions of the Communications Act of 1934*, as amended, and as supplemented by this chapter. . . ." Thus, had GSAT's permit been issued under the 1962 Act, which it was not, § 402(b) would nonetheless have governed judicial review thereof.

II. THERE IS NO CONFLICT BETWEEN THE DECISION OF THE NINTH CIRCUIT AND THOSE OF THIS COURT OR OF OTHER CIRCUITS

The Ninth Circuit's decision is supported by, and consistent with, the decisions of this Court construing statutory exclusive review provisions. *E.g.*, *Whitney Bank v.*

New Orleans Bank, 379 U.S. 411, 419 (1965). Moreover, this Court's reasoning in *United States v. SCRAP*, 412 U.S. 669, 694 (1973) fully supports the Court of Appeals' decision that NEPA does not provide a jurisdictional base for judicial review otherwise precluded by § 402(b).

There are many decisions by the circuit courts construing statutory review provisions analogous to § 402(b). *Getty Oil Co. v. Ruckelshaus*, 467 F.2d 349 (3rd Cir. 1972) was cited by the Ninth Circuit in support of its decision below and is the circuit court decision most directly in point since it considers the applicability of a statutory review provision to claims based on NEPA. The other circuit court decisions hold that administrative orders reviewable under special statutory review schemes may not be collaterally attacked in enforcement proceedings or in district court suits initiated under the Administrative Procedure Act or the Declaratory Judgments Act.[8] Without exception, these decisions are consistent with the rationale of the decision below.

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[8] E.g., *Robinson v. Dow*, 522 F.2d 855, 858 (6th Cir. 1975) exclusive review of CAB decisions, 49 U.S.C. § 1486); *City of Highland Park v. Train*, 519 F.2d 681, 688-89 (7th Cir. 1975), *cert. denied*, 47 L.Ed.2d 337 (1976) (exclusive review of orders of EPA Administrator, Clean Air Act, 42 U.S.C. § 1857h-5(b)); *Oljato Chapter of Navajo Tribe v. Train*, 515 F.2d 654, 659-61 (D.C. Cir. 1975) (Clean Air Act exclusive review provisions); *Anaconda Co. v. Ruckelshaus*, 482 F.2d 1301, 1304-5 (10th Cir. 1973) (Clean Air Act exclusive review provisions); *Kesinger v. Universal Airlines, Inc.*, 474 F.2d 1127, 1131-32 (6th Cir. 1973) (exclusive review of CAB decisions); *Utah Int'l, Inc. v. EPA*, 478 F.2d 126, 128 (10th Cir. 1973) (Clean Air Act exclusive review provisions); *Coca-Cola Co. v. FTC*, 475 F.2d 299, 302 (5th Cir.) *cert. denied*, 414 U.S. 877 (1973) (exclusive review of FTC orders, Federal Trade Commission Act, 15 U.S.C. § 45(c)); *Nader v. Volpe*, 466 F.2d 261, 265-68 (D.C. Cir. 1972) (exclusive review provisions of National Traffic and Motor Vehicle Safety Act, 15 U.S.C. § 1394(a)(1); *UMC Indus v. Seaborg*, 439 F.2d 953, 955 (9th Cir. 1971) (exclusive review of Board of Patent Interferences decisions, Atomic Energy Act, 42 U.S.C. § 2182); *B.F. Goodrich Co. v. Northwest Indus.*, 424 F.2d 1349, 1352-54 (3rd Cir.), *cert. denied*, 400 U.S. 822 (1970) (exclusive review of ICC orders, Urgent Deficiencies Act, 28 U.S.C. § 2321); *Taylor v. Cohen*, 405 F.2d 277, 279-80 (4th

None of the district court decisions cited by petitioners supports the notion that NEPA confers district court jurisdiction otherwise precluded by specific statutory review provisions. Four of the cases involved actions to review administrative orders which were not subject to exclusive review schemes.[9] Another involved a situation where there was no final agency order appealable under the exclusive review provisions of the applicable regulatory statute, and the court dismissed the complaint because of the eventual availability of appellate review under the statutory scheme.[10]

Izaak Walton League v. Schlesinger, 337 F.Supp. 287 (D.D.C. 1971) is the only reported case even remotely

Cir. 1968) (exclusive review of HEW orders, 20 U.S.C. § 24lk); *Gardner v. Alabama*, 385 F.2d 804, 810 (5th Cir. 1967); *cert. denied*, 289 U.S. 1046 (1968) (exclusive review of HEW orders, Social Security Act, 42 U.S.C. § 1316(a)(3)); *Frito-Lay, Inc. v. FTC*, 380 F.2d 8, 10 (5th Cir. 1967) (exclusive review of FTC decisions, Clayton Act, 15 U.S.C. § 21); *United States v. Southern Railway Co.*, 380 F.2d 49, 53-55 (4th Cir. 1967) (exclusive review of ICC orders); *United States v. Southern Railway Co.*, 364 F.2d 86, 91-93 (5th Cir. 1966); *cert. denied*, 386 U.S. 1031 (1967) (exclusive review of ICC orders); *Oling v. Air Line Pilots Ass'n*, 346, F.2d 270, 276 (7th Cir.), *cert. denied*, 382 U.S. 926 (1965) (exclusive review of CAB decisions).

[9] *Environmental Defense Fund v. Hardin*, 325 F.Supp. 1401 (D.D.C. 1971), was an action brought against the Secretary of Agriculture, whose decisions are not subject to a statutory review scheme. *Save Our Sound Fisheries Ass'n v. Calloway*, 387 F.Supp. 292 (D.R.I. 1974) was an action brought against the Secretary of the Army, whose decisions are not subject to a statutory review scheme. *Citizens for Clean Air, Inc. v. Corps of Engineers*, 349 F.Supp. 696 (S.D.N.Y. 1972), was an action challenging the validity of a permit issued by the Corps of Engineers, and there is no statutory provision prescribing exclusive review proceedings to test the validity of permits issued by the Corps of Engineers. *City of Romulus v. County of Wayne*, 392 F.Supp. 578 (E.D. Mich. 1975), was an action against a county to enjoin construction of an airport runway, and there is no statutory provision which restricts judicial review of action taken by counties.

[10] *Gage v. Commonwealth Edison Co.*, 356 F.Supp. 80 (N.D. Ill. 1972).

inconsistent with the Ninth Circuit's decision below. The district court in *Izaak Walton* misapplied this Court's decision in *Leedom v. Kyne*, 358 U.S. 184 (1958) to justify review of action by the Atomic Energy Commission which was subject to exclusive review in the court of appeals under 28 U.S.C. § 2342. Analysis of *Leedom v. Kyne* shows that it is plainly inapposite in this case.

Leedom involved a blatant violation of § 9(b) of the National Labor Relations Act, which governs NLRB certifications of collective bargaining units. Section 9(c) of the Act provides that a § 9 certification order may be contested in unfair-labor-practice enforcement proceedings under § 10 of the Act. Aside from this indirect, and not immediately available route, the Act makes no express provision for judicial review of § 9 certification orders. Moreover, this Court had previously held that § 9 certification orders are not final orders subject to direct appellate review in the Courts of Appeals (358 U.S. at 187). Thus, the issue before the Court in *Leedom* was whether the statute's *omission* of a provision for direct appellate review implied that Congress intended to preclude district court jurisdiction to review § 9 orders made in blatant violation of the statute's express command. In answering this question in the negative, the Court emphasized the absence of a statutory provision for direct appellate review. This meant, the Court said, that there would be no practical "means . . . to protect and enforce" rights guaranteed by § 9 unless jurisdiction were found in the district courts. Since § 9 rights were important, the Court reasoned, Congress by inference must be deemed to have intended district court jurisdiction. (358 U.S. at 190.)

In this case, of course, the situation is the very opposite of that in *Leedom*. Here there is a final agency order at issue, and here the statute does provide for direct appellate review. This is not a situation where con-

gressional silence with respect to immediately available appellate review compels an inference of congressional intent that district courts have jurisdiction. Quite the contrary, here Congress explicitly provided in § 402(b) a specific means of protecting any rights claimed to be adversely affected by an FCC order granting a construction permit. And in the situation here present, where Congress has expressly prescribed a scheme for review of the order in question, it would make no sense, and indeed, be contrary to Congress' express purpose and the rationale of *Leedom*, to infer a congressional intent that jurisdiction to review FCC orders be vested in the various district courts.

This Court has emphasized that "The *Kyne* exception is a *narrow one*, not to be extended to permit plenary district court review of" agency action that "does not comport with the law." *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964). As most recently explained by Judge Friendly, "... the most that can be extrapolated from *Leedom v. Kyne* is that an injunction may be issued 'if an agency refuses to dismiss a proceeding that is plainly beyond its jurisdiction as a matter of law. . . .'" *Sterling Drug, Inc. v. Weinberger*, 509 F.2d 1236, 1239 (2d Cir. 1975). There is nothing in this case even remotely approaching the bounds of such a narrow exception.

CONCLUSION

For the foregoing reasons the petition for certiorari should be denied.

Respectfully submitted,

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State of California)
) SS
County of Los Angeles)

James A. Bertotti, being first duly sworn deposes and says:

That affiant is and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years, and not a party to or interested in the within action; that affiant's business address is 1706 Maple Avenue, Los Angeles, California 90015

That on September 24....197.7.. affiant served copies of the within

Richard L. Mason, individually, and A. Marco Turk, Trustee of the Testamentary Trust under the will of Harry Turk, deceased,
Petitioners

VS

United States of America; Federal Communications Commission; GTE Satellite Corporation, etc.; General Telephone and Electronics Corporation; and American Telephone and Telegraph Company,
Respondents

to the following:

(via Air Freight)

Solicitor General
Department of Justice
Washington, D.C. 20530

(40 copies plus 2 for confirmation)

(via Messenger Service)

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(3 copies)

J. Mark Waxman, Esq.
Assistant U.S. Attorney
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I certify (or declare), under penalty of perjury that the foregoing is true and correct.

Executed on September 24...197.7.. at Los Angeles, California

STATE OF CALIFORNIA)
) SS
COUNTY OF LOS ANGELES)

James A. Bertotti

On this .....24th.....day of.....September..., A.D., 19.77., before me.....Lawrence E. Hieger..., a Notary Public in and for said County and State, personally appeared...James A. Bertotti.....known to me to be the person whose name is subscribed to the within Instrument, and acknowledged to me that...he.....executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal and year in this certificate first above written.

OFFICIAL SEAL
LAWRENCE E. HIEGER
NOTARY PUBLIC-CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Commission Expires May 20, 1978

Lawrence E Hieger
Notary Pullic in and for said County and State